EXHIBIT E

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1  UNITED STATES DISTRICT COURT
   SOUTHERN DISTRICT OF NEW YORK
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3  SECURITIES AND EXCHANGE
   COMMISSION,
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                 Plaintiff,
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             v.                          23 CV 4738 (KPF)
6
   COINBASE, INC. and COINBASE
7  GLOBAL, INC.,

8                 Defendants.            Conference
   ------------------------------x
9                                        New York, N.Y.
                                         July 13, 2023
10                                       10:15 a.m.

11 Before:

12                 HON. KATHERINE POLK FAILLA,

13                                       District Judge

14                          APPEARANCES

15 NICHOLAS MARGIDA
   PETER MANCUSO
16 LADAN STEWART
   BEN KURUVILLA
17      Attorneys for Plaintiff

18 WACHTELL LIPTON ROSEN & KATZ
        Attorneys for Defendants
19 BY:  WILLIAM SAVITT
        -and-
20 SULLIVAN & CROMWELL, LLP
   BY:  STEVEN R. PEIKIN
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1   the complaint, but not those that are in the preliminary

2   statement. However, it seems like we have agreement between

3   the parties as to what is and is not proper for the Court to

4   consider on a 12(c) motion.

5   THE COURT: I will speak about this a little bit later

6   on, sir, but I'm sort of hinting to the folks at the front

7   table that I really don't want a motion to strike. I am really

8   not convinced that we need to do a motion to strike, and I am

9   not sure it's going to save anybody any time, but you will be

10   able to persuade me of the contrary or not later on in this

11   proceeding.

12   Sir, what I am told by the defense is, fine, I am not

13   going to consider the stuff I can't consider. But if I can

14   consider the stuff within the universe of appropriate 12(c)

15   materials, I am going to find that your complaint should be

16   dismissed because you have not properly alleged that these

17   cryptoassets are in fact securities or that they are investment

18   contracts or that somehow the conduct taking place on the

19   Coinbase exchange is within the federal securities laws.

20   I would like to understand, because I think it is

21   presented to me as a matter of optics, yet it is of interest to

22   me. How do you -- and by you, I mean your clients --

23   contextualize Mr. Gensler's testimony? How do you

24   contextualize what he was saying about the absence of market

25   regulation of cryptoassets?

1   Is it your view that actually -- I understand, I

2   think, that you are suggesting that this wasn't estoppel and

3   that perhaps minds could be changed or maybe better arguments

4   could be made. But he did seem to suggest, and I thought he

5   was speaking for the commission when he did so, that the SEC

6   could not or did not regulate transactions of this type. What

7   has changed?

8   MR. MANCUSO: Your Honor, I think what we have to go

9   back to is to the actual context of that quote, and I am sure

10   your Honor has read it beyond just the snippet that is taken

11   out and put in the answer.

12   THE COURT: I have.

13   MR. MANCUSO: However, I think if we go back to the

14   actual transcript and you see that the question was asked, I

15   believe it involved Bitcoin, which is not at issue here, and

16   the SEC has made clear that that's not the focus of any of

17   these enforcement actions.

18   Also, I believe it was a congressman from the House of

19   Representatives who said, what can we do to make this safer? I

20   don't have it in front of me, the whole quote. But from what I

21   remember, it was what can we do to make this market more robust

22   so that people -- the way I interpreted it is so people trust

23   it.

24   Mr. Gensler said a couple of things about the

25   unregulated nature. There is no regulator in this space,

1   meaning no one is currently regulating it. I think taking,

2   there is no regulator in this space out of context and just

3   throwing it in the answer is a nice soundbite, but it doesn't

4   necessarily mean that the chair committed the SEC to not, at

5   some point, based on some conduct that violates the securities

6   law, bring an enforcement action.

7   That's another thing that I think dovetails with the

8   major questions doctrine, is that the SEC is not attempting to

9   regulate all of the crypto industry in this country or around

10   the world. We regulate conduct, and we are regulating

11   Coinbase's conduct, which we believe violates the law.

12   And if you look and you kind of synthesize all of

13   Coinbase's arguments, they are basically saying, in terms of

14   the equitable arguments, what Mr. Gensler had said, the major

15   questions doctrine, they are saying that if the SEC or some

16   other criminal authority is looking at conduct of a crypto

17   actor and it violates the securities law or some other law,

18   that they don't have authority to do that because Congress

19   hasn't given it yet. That's just incorrect and that, we

20   believe, to be a nonsensical argument. So I think that these

21   all have to be looked at together, and that would be my

22   response to how the Court should view it.

23   THE COURT: Are defendants correct, and I think the

24   answer is yes to this, that the commission is not considering

25   Bitcoin or Ether to be securities, cryptoassets from Bitcoin or

1   that this would not later be found to be a security.

2   THE COURT: Let's just pause so I can just sort of get

3   rid of the skepticism I currently have as I hear that answer.

4   I am not saying that the commission should be

5   omniscient at the time it's evaluating a registration statement

6   and that it should know all things. But I would have thought

7   the commission was doing diligence into what Coinbase was

8   doing, and somehow I thought that it would say, you know, you

9   really shouldn't do this. This is violative of the securities

10 laws, or we are kind of in some interesting unchartered

11 territory here with respect to whether the assets on your

12 platform are securities, so be forewarned that maybe some day

13 there could be a problem.

14   I hear what you are saying, which is, I shouldn't give

15 it any consideration and it doesn't absolve the defendants of

16 any of the securities laws. Yet I'm just wondering why it is

17 that the commission saw fit to bless what they were doing,

18 because that is kind of what they did by issuing the S-1, and

19 that there not be any discussion about the possibility of

20 violative conduct. Again, you may be right, but I am just

21 viewing your answer with a measure of skepticism.

22   MR. MANCUSO: Understood, your Honor.

23   Respectfully, I would take issue again with the word

24 blessing their conduct or their business. This is about

25 disclosures. In fact, and I think we lay it out in our

1   complaint, that Coinbase disclosed in their S-1 that the risk

2   that the assets that are being traded on their platform could

3   be found to be securities, and that came from the process back

4   and forth between --

5   THE COURT: You never could have said to them, hey,

6   you guys need to register as a securities exchange. That was

7   within the power of the SEC to do, was it not?

8   MR. MANCUSO: I can't really speak to that.

9   THE COURT: I think it was. I don't think anything

10 stopped the commission from doing it. I am not suggesting,

11 sir, that this is dispositive or that there is an estoppel

12 issue. But it's not crazy in the Failla parlance for Coinbase

13 to think that what they were doing was OK because it was

14 exactly what you let them do when they issued the S-1. That's

15 the point I'm making. You may say that they and I are reading

16 too much into the issuance of the S-1.

17   MR. MANCUSO: I'd agree with that.

18   THE COURT: I might disagree with that, but I do

19 understand.

20   Eventually, sir, we are going to get to the major

21 questions doctrine, but let me ask you. You have heard me

22 engage with Mr. Savitt in discussions about the arguments that

23 they contemplate making. I have certainly seen your responses,

24 at least as they are in writing. Is there something else that

25 you want me to know or do you wish to engage at a more granular

1   level with any of the responses that Mr. Savitt gave me this

2   morning?

3   MR. MANCUSO: Your Honor, if we are not going to talk

4   about the major questions doctrine -- and you would like to

5   talk about secondary trading or their reasons for moving to

6   dismiss -- if that was it, I will defer to my colleague to

7   handle those.

8   THE COURT: Are you coming back for major questions

9   doctrine?

10   MR. MANCUSO: I will be coming back, unless you want

11   to hear about that now.

12   THE COURT: I will wait. Thank you so much.

13   MR. MANCUSO: Thank you, your Honor.

14   MR. MARGIDA: Thank you, your Honor.

15   I don't want to belabor this because I think the

16   positions of the parties are fairly set out in the letters.

17   I do want to point out that what Coinbase is doing

18   with respect to reading into *Howey* a contract requirement is

19   very interesting. They acknowledge that *Howey* says an

20   investment contract can be a contract transaction or a scheme,

21   and in their letter they say the transaction or scheme, yeah,

22   but associated contractual undertakings. Today I think Mr.

23   Savitt's phrase was schemes of related contracts.

24   The SEC's position is that's just wrong as a matter of

25   law. No court in 75 plus years has held that *Howey* requires a

1   common law contract. *Howey* itself said the paper or the

2   financial instrument is incidental. Courts in this circuit,

3   including *Gary Plastic* and *Glen-Arden*, have looked at what

4   *Howey* compels, which is the economic reality of the

5   transaction. They have looked at the series and collection of

6   inducements, representations, what they are selling, the

7   enterprise.

8   And Judge Castel in *Telegram* says, scheme is used in a

9   descriptive, not a pejorative sense. And Coinbase seems to

10 ignore the fact that courts are actually finding cryptoassets

11 to be securities where there is no contract. *Balestra v.*

12 *ATBCOIN* in this court is an example of that where there is no

13 contract.

14   In *Telegram*, Judge Castel is very clear -- and I know

15 it was in the context of, the Court found there was one

16 continuous offering, but the Court also found that there is no

17 ongoing -- there is no ongoing privity between what happens in

18 like public market sales. So there is an initial offer to 175

19 initial purchasers and *Telegram* finds -- and this relates to

20 the secondary market transaction argument -- *Telegram*

21 envisioned that there would eventually be secondary sales, and

22 there is no distinction -- I'll get to that point in a minute.

23   On *LBRY*, we think it speaks for itself. Putting aside

24 any examination of the transcript, I think the Court itself

25 draws no distinction between primary and secondary

1   transactions. The '33 and the '34 Acts draw no such

2   distinction. There are no such distinctions drawn in other

3   securities market contexts, and Coinbase offers no compelling

4   reason why we should draw one here.

5   Commonality -- I think Mr. Savitt was hitting on like

6   investing in an enterprise. Commonality, as your Honor knows,

7   is about tying -- if you're talking about horizontal

8   commonality, it's tying the fortunes of investors together, and

9   then strict vertical commonality is about tying the enterprise

10   itself, the people who are running the platform or network or

11   the issuers together with investors. We have alleged in our

12   complaint, and they have to be taken as true at this stage,

13   that those elements are satisfied.

14   The fortunes of an investor who buys a cryptoasset

15   security, including one of the 13 that we have alleged here --

16   and, by the way, your Honor, the commission has spoken on other

17   cryptoassets that are available that the commission thinks are

18   securities. The *Wahi* litigation, insider trading litigation,

19   named specific assets. Coinbase didn't delist any of those,

20   except for one later when the relevant platform became defunct.

21   We also identify in paragraph 124 of the complaint other assets

22   that the commission has brought enforcement actions on.

23   The argument that the commission hasn't spoken until

24   now with this complaint about assets being securities on

25   Coinbase's platform is just not true.

1   I don't want to belabor this, but coming back to your

2   Honor's question from earlier this morning about the reasonable

3   expectation of profits based on the efforts of others, someone

4   who purchases in an initial offering on a Monday, versus on a

5   secondary platform the following week, has the same expectation

6   of profit based on the representations of the issuers, the

7   promoters and the developers, so I think that's pretty clearly

8   alleged in our complaint as well.

9   If your Honor has other questions about the *Howey*

10   related aspects, but I think our position is well set out, and

11   we look forward to briefing the issues.

12   THE COURT: On the issue of staking, in listening to

13   Mr. Savitt, I began thinking that the parties had completely

14   different views of the staking program. Because the way it was

15   being described to me by him suggested more. I believe he used

16   the word administrative. I guess the defendants are suggesting

17   that it's sort of a means of verifying trades and transactions

18   and, again, something almost back office-y, although there is

19   perhaps a profit-generating element to it as well.

20   Is it that you just hold two different views as to

21   what the staking program is? Has your position been clarified

22   by Mr. Savitt's comments to me this morning? And if not,

23   what's violative about the staking program?

24   MR. MARGIDA: I am really confused about Coinbase's

25   decision to move for judgment on the pleadings with respect to